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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-183

JAMES R. COSON, *et al.*, *Petitioners*

v.

UNITED STATES OF AMERICA, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF FACTS 2

REASONS FOR GRANTING THE WRIT 5

1. The Use of Summonses in IRS Criminal Investigation 6

2. Under *Donaldson* a Summons Should Not Be Enforced If Criminal Prosecution Is Recommended After Issuance of the Summons 6

3. Lower Federal Courts Are in Conflict on Whether a Summons May Be Enforced After A Recommendation for Criminal Prosecution 10

a. Time of Enforcement 10

b. Time of Issuance 11

c. There Is Intolerable Uncertainty in the Lower Courts 12

APPENDIX 1a

Opinion of the Court of Appeals 1a

Transcript of Oral Ruling of the District Court 4a

Order of the Court of Appeals Staying Issuance of Mandate 6a

Affidavit of Edgar L. Fraser In Support of Motion To Augment Record 7a

Statutory Provisions Involved 14a

CITATIONS

CASES: Page

Abel v. United States, 362 U.S. 217 (1960) 9
Donaldson v. United States, 400 U.S. 517 (1971) ..*passim*
Kyriaco v. United States, 400 U.S. 922 (1971) .... *passim*
In Re Magnus, Mabee & Reynard, Inc., 311 F.2d 12 (2d Cir. 1962), cert. denied, 373 U.S. 902 (1963) .. 12
Reisman v. Caplin, 375 U.S. 400 (1964) 6
United States v. Awerkamp, 497 F.2d 832 (7th Cir. 1974) 12, 13
United States v. Billingsley, 469 F.2d 1208 (10th Cir. 1972) 11, 13
United States v. Cromer, 483 F.2d 99 (1973) 11, 12
United States v. Giordano, 419 F.2d 564 (8th Cir. 1969), cert. denied, 397 U.S. 1037 (1970) 12
United States v. Henry, 491 F.2d 702 9
United States v. Hodgson, 492 F.2d 1175 (1974) 13
United States v. Kyriaco, 376 F. Supp. 1184 (C.D. Cal) .8, 12
United States v. Monsey, 429 F.2d 1348 (7th Cir. 1970) 11, 12
United States v. Moriarity, 453 F.2d 747 (7th Cir. 1970) 12
United States v. O'Connor, 118 F. Supp. 248 (D. Mass. 1953) 10
United States v. Powell, 379 U.S. 48 (1964) 9
United States v. Weingarden, 473 F.2d 454 (6th Cir. 1973) 12
United States v. Zack, 375 F. Supp. 825 (D. Nev. 1974) .9, 12

STATUTES:

Internal Revenue Code of 1954
26 U.S.C. § 7402(b) 3, 6
26 U.S.C. § 7602 .....2, 3, 6
26 U.S.C. § 7604 .....3, 6
28 U.S.C. § 1254(1) 2

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 45(c) 3

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

JAMES R. COSON, *et al., Petitioners*

v.

UNITED STATES OF AMERICA, *et al., Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, 515 F.2d 906 (9th Cir. 1975), is reprinted in the Appendix at pp. 1a-3a. The District Court (Hon. M. D. Crocker) did

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not issue an opinion; the transcript of the Court's oral ruling is reprinted in the Appendix at pp. 4a-5a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1975 (App. 3a).[1] A timely petition for rehearing *en banc* was denied on June 25, 1975. On July 21, 1975, the Court of Appeals entered an order staying issuance of the mandate pending disposition of the case by this Court, provided this petition was filed with the Court by August 1, 1975. (App. 6a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an administrative summons under section 7602 of the Internal Revenue Code, issued prior to a recommendation for criminal prosecution, may be enforced against a taxpayer after criminal prosecution of him has been recommended, when the sole purpose of enforcement is to aid prosecution of the criminal case against him.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in the appendix. App. 14a-15a.

STATEMENT OF FACTS

This is an Internal Revenue Service summons enforcement proceeding. Petitioners are James R. Coson, an individual, and thirteen corporations which he con-

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[1] References to the Appendix to this petition are designated "App." with a page number.

trols.[2] Recommendations for criminal prosecution have been made against petitioner Coson and two of the petitioner corporations, Fresno Brass Works and Catalina Brass Company, Inc.

Respondents are the United States of America and James A. Creagmile, Special Agent of the Intelligence Division of the Internal Revenue Service.[3] Respondents instituted this proceeding in the United States District Court for the Eastern District of California under sections 7402(b) and 7604 of the Internal Revenue Code seeking enforcement of a summons issued by Special Agent Creagmile pursuant to section 7602.[4] The summons directed petitioner Coson to produce the books and records of the petitioner corporations for the years 1968, 1969 and 1970 and to testify in connection therewith.[5]

A hearing was held in the District Court on April 4, 1973. The Court orally ordered enforcement of the

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[2] The corporations are: General Sprinkler Corporation; General Sprinkler Co., a/k/a General Controller Corporation; Fresno Brass Works; Catalina Machinery and Equipment Company, Inc.; Catalina Brass Company, Inc.; Rain-Bo Metals, Inc.; Rain-Bo Manufacturing Co.; Febco, Inc.; Foundry Products Company, Inc.; Landscape Irrigation Planning Co., Inc.; Mustang Motor Products Corporation; Sprinkler De Americana; and Buckner Industries, Inc.

[3] Special Agent Creagmile has retired and has been replaced by Special Agent Philip G. Larson.

[4] Unless otherwise noted, section references are to the Internal Revenue Code of 1954, as amended, 26 U.S.C. §§ 1 *et seq.*

[5] Prior to the issuance of the single, omnibus summons in issue, the Internal Revenue Service had inundated petitioners with 314 separate summonses demanding essentially the same materials. These were not enforced, either because the Special Agent withdrew them or because respondents refused to pay the witness fees required under Rule 45(c) of the Federal Rules of Civil Procedure.

summonses and stayed enforcement pending appeal to the United States Court of Appeals.

While the appeal was pending, petitioners were advised, by letter dated January 2, 1974, that their cases had been referred by the District Director to the Office of Regional Counsel "with a recommendation that criminal proceedings be instituted" against them for violations of the Internal Revenue laws. (App. 7a, 10a-11a.) Regional Counsel, in turn, recommended to the Department of Justice that criminal prosecution be considered, and, on May 17, 1974, petitioners were notified that "the case has been forwarded" to that agency. (App. 7a, 12.) Subsequently, counsel for petitioners was orally advised by a representative of the Department of Justice that the cases had been referred to Special Agent Larson. On September 17, 1974, Special Agent Larson wrote petitioners a letter stating (App. 8a, 13a):

> I wish to inform you that as of this date, the criminal investigations of James R. Coson, Fresno [illegible]ss Works, and Catalina Brass Company are still open. Because of this and due to the fact that the summons enforcement proceedings are pending, it is felt that we are in no position to discuss any possible civil settlements at this time.

Thus, the civil tax proceedings are presently in abeyance and the sole purpose of enforcement of the summons at this time is to gather evidence for the criminal prosecutions.

The recommendations for criminal prosecution were brought to the attention of the Court of Appeals by petitioners' Motion to Augment Record. Petitioners urged that the summons should not be enforced since

its sole purpose was now to obtain evidence for criminal prosecution. Despite the fact that the recommendations for criminal prosecution had not been made until after the District Court hearing, the Court of Appeals denied the motion upon the ground that the matter had not been presented to the District Court.

On April 17, 1975, the Court of Appeals affirmed the District Court's order enforcing the summons, although it did rule in petitioners' favor on other issues. (App. 1a-3a.) The opinion of the Court of Appeals makes no reference to the intervening recommendation for criminal prosecution. On June 25, 1975, a timely petition for rehearing *en banc* was denied. On July 21, 1975, a stay of mandate was granted, provided this petition was filed with the Court by August 1, 1975. (App. 6a.)

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the issue whether a summons *issued before* a recommendation for criminal prosecution may legitimately be *enforced after* such a recommendation has occurred. This issue was not presented in *Donaldson* v. *United States,* 400 U.S. 517 (1971), because no recommendation for criminal prosecution had been made. When a recommendation for prosecution is made after issuance of a summons, however, this Court has indicated that the summons may no longer be enforceable. *Kyriaco* v. *United States,* 401 U.S. 922 (1971).

There is confusion and conflict in the lower courts on this issue. It is a recurring and significant issue in the administration of the tax laws, and litigation will continue to burden the federal courts until it is resolved by this Court.

1. The Use of Summonses in IRS Criminal Investigations.

Section 7602 summonses are commonly used in criminal tax investigations to command the production of documents or testimony; they are enforceable by court order. *See* sections 7402(b), 7602 and 7604 (App. 14a-15a.) Criminal tax investigations are conducted by Special Agents of the Intelligence Division of the Internal Revenue Service. Civil audit activity is normally suspended while the Special Agent—functioning as a "cop in business clothes"—conducts his investigation. If he determines that a criminal violation has occurred, he summarizes his findings in a Special Agent's Report which he submits to the District Director with a recommendation for criminal prosecution.

If the District Director concurs in the Special Agent's Report, the case is sent to the appropriate Regional Counsel's office with a recommendation for criminal prosecution. If Regional Counsel agrees, the case is referred to the Department of Justice with a recommendation that criminal prosecution be considered. If further evidence is required thereafter, the Department of Justice may instruct the United States Attorney to call witnesses before the grand jury and utilize grand jury subpoenas consistently with the Federal Rules of Criminal Procedure.

2. Under *Donaldson* a Summons Should Not Be Enforced if Criminal Prosecution Is Recommended After Issuance of the Summons.

In *Donaldson* v. *United States, supra,* this Court reaffirmed the principle—announced in *Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964)—that a section 7602 summons may not be used "for the improper purpose of obtaining evidence for use in a criminal prosecution

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. . . ." Prior to the *Donaldson* decision, there had been a rising tide of litigation contesting the role of Special Agents in tax investigations. Taxpayers were resisting enforcement on the ground that Special Agents were concerned solely with obtaining evidence for use in criminal prosecutions. The Court in *Donaldson* refused to find that evidence was being obtained for use solely in a criminal prosecution simply because a Special Agent had appeared on the scene. To find otherwise, the Court stated, would require the Service "to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution." 400 U.S. at 536. It was in this context that the Court concluded that "under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." *Id.*

The issue in the instant case—whether a summons may legitimately be enforced if the recommendation for prosecution is made *subsequent* to issuance of the summons—was not before the Court in *Donaldson*. The principles of *Donaldson* apply with full force, however, to an outstanding summons after a recommendation for criminal prosecution has been made. At that point, the case changes from a tax investigation to a tax prosecution, and the "sole objective" of enforcing the summons is to "obtain evidence for use in a criminal prosecution." 400 U.S. at 533.

Contemporaneously with its decision in *Donaldson*, this Court indicated that a summons may not be enforceable when a recommendation for prosecution has been made subsequent to issuance. At that time the Court had before it another summons enforcement case raising the "improper criminal purpose" issue.

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Kyriaco v. *United States,* No. 448, O.T. 1970. After the petition had been filed with the Court in *Kyriaco,* the Internal Revenue Service referred the criminal case to the Department of Justice. This fact was brought to the attention of the Court. Supplemental Memorandum for the Petitioners, *Kyriaco* v. *United States.* Almost simultaneously with its decision in *Donaldson,* the Court denied the petition in *Kyriaco* "without prejudice . . . to applications . . . to the District Court for such relief, if any, as may be appropriate in the light of developments occurring since the petition for a writ of certiorari was filed in this Court." 401 U.S. 922 (1971). The Court's statement strongly suggests that an intervening recommendation for criminal prosecution must be taken into account under *Donaldson.*

In subsequent proceedings in *Kyriaco,* the District Court refused to enforce the summons on the ground that doing so would violate the rule laid down in *Donaldson:*

> It strains the meaning of the Court to conclude . . . that motive at the time of issuance is the ultimate fact, requiring enforcement irrespective of what subsequently occurs. Implicit in the validity of a summons is the use to which the information obtained is to be put. Issuance is only the prelude to enforcement. It is the use of the information sought that has concerned the courts that have considered this question, and certainly the language of *Donaldson, supra,* can only be read in that context even though issuance was the factual situation in which the question was presented. [*United States* v. *Kyriaco,* 326 F. Supp. 1184, 1185-86 (C.D. Cal. 1971).]

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The District Court's application of the principles of *Donaldson* to the new facts of *Kyriaco* properly interpreted this Court's rulings and should govern this case, for, once again, a referral to the Department of Justice has intervened between issuance and enforcement of a section 7602 summons.

The heart of the administrative summons procedure is not the *issuance* of a summons but the *obtaining* of summoned documents or testimony by compulsory process. Use of the courts to obtain evidence for a criminal case by enforcement of administrative summonses is clearly improper. As this Court pointed out in *United States* v. *Powell,* 379 U.S. 48, 58 (1964), "it is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." The clear teaching of *Donaldson* and *Powell* is that it is improper for a court to compel production once a recommendation for criminal prosecution has occurred.

Nor should the Department of Justice be permitted to use Special Agent Larson as a "cat's-paw" to gather additional evidence for the criminal case. In *Abel* v. *United States,* 362 U.S. 217, 226 (1960), this Court specifically condemned "the deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case . . . ." The lower courts have implemented this rule by forbidding the use of an IRS section 7602 summons to aid the United States Attorney or the Department of Justice. *United States* v. *Henry,* 491 F.2d 702 (6th Cir. 1974) (§ 7602 summons may not be used to gather evidence to assist pending narcotics prosecution); *United States* v. *Zack,* 375 F. Supp. 825 (D. Nev. 1974) (§ 7602 summons may not be used as substitute for search war-

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ran[*]; *United States* v. *O'Connor,* 118 F. Supp. 248 (D. Mass. 1953) (§ 7602 summons may not be used to gather evidence for a pending prosecution). As Judge Wyzanski explained in *O'Connor:*

> To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. [118 F. Supp. at 251].

To summarize, the Internal Revenue Service referred this case to the Department of Justice with a recommendation that criminal prosecution be considered. The civil proceedings are in abeyance while the criminal cases are being pursued. Under the principles enunciated in *Donaldson* and *Kyriaco,* the "sole objective" of enforcement of the outstanding section 7602 summons at this time would be to "obtain evidence for use in a criminal prosecution". Enforcement of the summons would thus constitute an "abuse of process" under *Powell.* Accordingly, the summons should not be enforced.

3. Lower Federal Courts Are in Conflict on Whether a Summons May Be Enforced After a Recommendation for Criminal Prosecution.

There is conflict and confusion in the lower courts on whether the validity of a summons is to be tested according to the facts at the time of enforcement or at the time of issuance.

a. *Time of Enforcement.* Courts of Appeals of two Circuits have held that a summons may not be enforceable when there has been an indictment or recommen-

* Reversed and remanded for hearing on criminal purpose issue. ___ F.2d ___, No. 74-2467 (9th Cir., July 16, 1975), BNA Daily Tax Report (July 30, 1975), p. H-4.

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dation for criminal prosecution subsequent to issuance. In *United States* v. *Monsey,* 429 F.2d 1348 (7th Cir. 1970), an indictment was filed against respondent during the pendency of enforcement proceedings. The Court of Appeals for the Seventh Circuit stated that "enforcement of the summonses under the present circumstances would serve primarily as an aid to the current criminal prosecutions." 429 F.2d at 1351. The Court explained that:

> Events subsequent to administrative issuance may change circumstances to such an extent that enforcement of a summons may bring about improprieties. Such equitable considerations demand that the court consider intervening occurrences as well as the status quo at the date of issuance. These principles call here for consideration of the supervening indictment. . . . [*Id.*]

The Tenth Circuit applied the same rule in *United States* v. *Billingsley,* 469 F.2d 1208 (10th Cir. 1972). Remanding the case to the District Court for further proceedings on the validity of a summons, the Court stated that:

> . . . the District Court should also consider any new developments subsequent to appellants' notice of appeal such as the institution of a criminal prosecution . . . *or the referral of* [*the*] *case to the Department of Justice. See* Kyriaco v. United States, 401 U.S. 922 . . .; United States v. Kyriaco, C.D. Cal., 326 F. Supp. 1184." [469 F.2d at 1210; emphasis added.].

b. *Time of Issuance.* Decision of the Ninth Circuit, below, and the Second, Sixth and Eighth Circuits are in conflict with the decisions of the Seventh and Tenth Circuits. In *United States* v. *Cromer,* 483 F.2d

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99 (9th Cir. 1973), and *United States* v. *Weingarden,* 473 F.2d 454 (6th Cir. 1973), the courts refused to take intervening recommendations for criminal prosecution into account in enforcing the summonses. 483 F.2d at 101; 473 F.2d at 461. The Second Circuit upheld enforcement of a summons even though there had been an intervening indictment. *In Re Magnus, Mabee & Reynard, Inc.,* 311 F.2d 12, 16 (2d Cir. 1962), *cert. denied,* 373 U.S. 902 (1963). *See also United States* v. *Giordano,* 419 F.2d 564, 568, n.5 (8th Cir. 1969), *cert. denied,* 397 U.S. 1037 (1970) (dictum).

c. *There is Intolerable Uncertainty in the Lower Courts.* Other decisions by the Courts of Appeals for the Seventh, Ninth and Tenth Circuits have rendered the law uncertain and unworkable.

In the decision below, the Ninth Circuit did not address the issue at all. In its earlier decision in *Cromer, supra,* the Court did not even cite *Kyriaco, supra.* Moreover, another District Court in the Ninth Circuit recently ignored *Cromer* and relied upon *Kyriaco* in refusing to enforce a summons issued after a search warrant had been used to obtain comparable materials from the same taxpayer. *United States* v. *Zack, supra.*

The Seventh Circuit, in *United States* v. *Moriarity,* 435 F.2d 747 (7th Cir. 1970), without overruling or disapproving its earlier decision in *Monsey, supra,* permitted enforcement of a summons where tax evasion indictments were returned several days prior to the enforcement order. Then, in *United States* v. *Awerkamp,* 497 F.2d 832 (7th Cir. 1974), the Seventh Circuit—in a case where no recommendation had been made—stated the rule in a manner which appears

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clearly to require consideration of a recommendation for prosecution, made subsequent to issuance of a summons, in determining whether to enforce it. The Court said:

> In Donaldson v. United States . . . the Supreme Court held that "Congress clearly has authorized the *use of the summons* in investigating what may prove to be criminal conduct" *up until the point* "where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution. . . ." *This point is reached when a recommendation for criminal prosecution is made.* [497 F.2d at 834; emphasis added.]

In *United States* v. *Hodgson,* 492 F.2d 1175 (1974), the Tenth Circuit permitted enforcement of a summons where a recommendation for prosecution was being considered within the Internal Revenue Service but had not yet been referred to the Department of Justice. It relied upon its prior decision in *Billingsley, supra*, yet stated in dictum, inconsistently with *Billingsley,* that "the validity of a summons is tested as of the date of issuance." 492 F.2d at 1177.

In sum, there is sharp conflict and considerable confusion among the lower federal courts on how to apply this Court's decision in *Donaldson* and its statement in *Kyriaco.* The Court should grant the petition and rule that a summons may not be enforced once a recommendation for criminal prosecution has been made. For, once there is a recommendation, the use of administrative summonses to gather criminal evidence is fundamentally unfair. Our Constitution, statutes and traditions establish procedures for the compulsory production of evidence for use in criminal proceedings. Those procedures are carefully defined to protect rights of the accused. The use of administrative summonses to

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gather evidence for use against an accused is incompatible with those procedures. Taxpayers will continue to resist erosion of their rights, the sound administration of our tax system will be impaired and the burden on the courts will continue until the present conflict is resolved by this Court.

For the foregoing reasons, the Court should issue a writ of certiorari to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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[FILED: APR. 17, 1975]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2134

UNITED STATES OF AMERICA, ETC., ET AL., *Appellee,*

v.

JAMES R. COSON, etc., ET AL., *Appellant.*

Opinion

Appeal from the United States District Court
for the Eastern District of California

Before: CHAMBERS, CHOY, and GOODWIN, Circuit Judges

CHAMBERS, Circuit Judge:

The Internal Revenue Service wants to inspect a mass of business records for several years of thirteen corporations apparently dominated by Coson. On a request to enforce a massive summons, the district court has ordered compliance. Thus, we have an appeal.

With the gracefulness of an elephant, the Internal Revenue Service has given Coson a lot to complain about. But we find the complaints mostly beyond our reach.

Early in January 1973, Coson was served with 157 summonses for books and records, apparently one for each of several years for each of several corporations. Coson appeared but demanded witness fees and mileage on each summons. And possibly he was right. So the first set went awry. The Service, without regard for the number of trees required to produce the pulp to produce the paper, then got out another group of summons, again about as massive as the first set, requiring attendance on another day. This group was withdrawn.

Finally, round three arrived. The Service issued one comprehensive summons. The summons day arrived. Coson appeared, but declined cooperation until paid alternately

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$260.00 plus mileage or $8,840.00 plus mileage for the government's previous annoying summonses now cancelled. His well-known demand had induced the latest summons.

Considered alone, the sum of $22.00 offered by the Internal Revenue Service agent on the comprehensive summons would be enough.

As part of the scene, at the last go round, the agent tendered Coson a chance for him to sign a voucher which we understand would have produced a good government check for $22.00. Coson quibbles about the form of the claim. But he could have corrected it. And, we shall not require the internal revenue agents to go around like narcotic agents with bait money.

We are impressed that the Service should not be able to summon in a record custodian even twice without the tender of, or arrangements for quick payment of, fees for the past appearances and the present one. We hold, therefore, that on the first abortive appearance Coson was entitled to be shown the way to the paymaster for $22.00. (We do not rule on what he would be entitled to if he had literally complied with all of the 157 summonses.) We hold that in appearing on the third or omnibus summons he was entitled to $22.00 now and $22.00 for the delinquency, or $44.00. Thus, the offer was defective on the omnibus summons. Now, when the summons is enforced, he will have to come again and he will be entitled to cash, or something almost as good, such as a readily payable claim, for his new appearance, or a total of $66.00. This assumes his mileage will be the same. The order enforcing the summons should be amended to assure payment for Coson's three appearances before he hands over the records for inspection.

We believe we are following *Roberts* v. *U.S.*, 397 F.2d 968 (5th Cir. 1968).

We are not impressed with other points raised by the appellant. If Miranda should be violated, that can be

raised as a shield at the appropriate time. If the Service tries to search beyond the bounds of propriety under the summons, Coson can go back to the district court. The court properly handled the discovery issue correctly and the arguments about the Freedom of Information Act seem inappropriate.

Coson is indignant about either an assessment or the fixing of a lien by the Internal Revenue Service. He says it represents an outrageous breach of faith by the Service and that he wants discovery about it. If it is true, the Service should do, in common fairness, something to correct it. But we hold it is no part of this proceeding.

The order for enforcement should be modified as indicated above in a way that Coson will not be forced to fall back on the Tucker Act. It is so ordered.

There will be no costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable M. D. Crocker, District Judge

No. F-137-Misc.

UNITED STATES OF AMERICA, etc., ET AL., *Petitioners,*

v.

JAMES R. COSON, etc., ET AL., *Respondents.*

Reporter's Transcript of Proceedings

Fresno, California

April 4, 1973

APPEARANCES:

(As previously noted).

Pages: 41-159

[154] made in our answer, they haven't put any affirmative prove in on that.

I would merely submit, your Honor, the case as we have made it, the best we could, and submit the affirmative defenses and earnestly submit that the petition and the order to show cause be denied, your Honor.

THE COURT: Well, I don't see any basis for not enforcing the summons in this case. I am a little concerned that Mr. Coson may not have access to some of the records requested.

MR. TEEL: Your Honor, it is for that reason the Government made the corporations respondents as well as Mr. Coson. If Mr. Coson doesn't have access to certain of the records then an officer of the corporation could bring the records.

MR. FRASER: I want to assure the court that as far as the records, except General Sprinkler Corporation, there

would be no problem. We have never made an attempt to conceal any of the records.

I will submit, your Honor, we have made no secret of Mr. Coson's relationship with General Sprinkler, and that on April 1st he would be leaving.

MR. TEEL: Again, your Honor, we made the corporations parties to this proceedings, and if, for some reason, Mr. Coson does not have custody of the [155] records, the corporations have been notified of this proceedings, to examine their records, and it will be a pro forma matter for them to designate the officer who does have custody, and they have been parties and have raised all the contentions they have regarding the enforceability of the summons, and I see no reason why enforcement should not be granted.

THE COURT: Well, I wanted to make it clear that Mr. Coson is not going to be required to produce records that he can't produce, counsel.

MR. TEEL: Yes, your Honor, that will be very clear.

THE COURT: It's only the corporations that will be required to do so.

Very well. I will grant the Government's petition for enforcement of the Internal Revenue summons, with that understanding, and will deny the protective order as requested by the respondents.

MR. FRASER: May I make a motion, your Honor, under Rule 62 and under Reisman v. Caplan, that we would intend and do intend, your Honor, to file notice of appeal. I believe we have an automatic stay of ten days under Rule 62, during which time we would perfect our appeal, and we would ask the court at this time for a stay until the appellate proceedings have been decided.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed July 15, 1975]

No. 73-2134

Docket No. F-137

UNITED STATES OF AMERICA, *Petitioner-Appellee,*

v.

JAMES R. COSON, ET AL., *Respondent-Appellant.*

Order Staying Issuance of Mandate

Upon application of Edgar L. Fraser, Esq., counsel for the Appellants, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellants herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before August 1, 1975.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ RICHARD H. CHAMBERS
Richard H. Chambers
United States Circuit Judge.

Dated: San Francisco, Calif. July 14, 1975.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *etc., et al., Petitioner-Appellee,*

v.

JAMES R. COSON, *etc., et al., Respondents-Appellants.*

No. 73-2134

Affidavit of Edgar L. Fraser in Support of Motion To Augment Record

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

EDGAR L. FRASER, Esq., being first duly sworn deposes and says:

1. That all times herein mentioned he has been and now is an attorney at law and general partner in the firm of Wadsworth, Fraser & Dahl, and has represented all of the appellants and respondents in the above entitled action since the commencement of this action.

2. Affiant did receive a letter, dated January 2, 1974, signed by Lamont R. Olson, Attorney, Regional Counsel, Internal Revenue Service, Western Division, stating that the tax investigation of JAMES R. and ANGELA COSON for the years 1968 through 1971, the corporate income tax liabilities of FRESNO BRASS WORKS, INC. for the fiscal years ending July 31, 1968 through July 31, 1970, and the corporate income tax liabilities of Catalina Brass Company, Inc. for the fiscal years ending June 30, 1969 and June 30, 1970, had been referred to the Office of Regional Counsel with a recommendation that criminal proceedings be instituted against JAMES R. COSON, CATALINA BRASS CO., INC. and FRESNO BRASS WORKS for the years in question. A copy of said letter is attached hereto marked Exhibit "A".

3. Affiant received a second letter dated May 17, 1974, also signed by said Lamont R. Olson, Attorney, on behalf of the said Regional Counsel advising that the case had been forwarded to the Department of Justice, Washington,

D.C. A copy of said letter is attached hereto marked Exhibit "B".

4. On July 29, 1974, affiant personally conferred with Mr. James L. Powers, Attorney, Criminal Tax Division, Department of Justice, Washington, D.C., and discussed the criminal aspects of the case.

5. In September of 1974, affiant was orally advised by said James L. Powers that the Department of Justice had referred the case to the Special Agent in Fresno, California. Under letter dated September 12, 1974, affiant addressed a letter to Mr. Marshall Jennings, Revenue Agent, who had been auditing the records of the appellants, and inquired "I specifically desire to know whether you and Special Agent Larson intend to revive the criminal investigation".

6. Affiant then received a letter dated September 17, 1974, from Philip G. Larson, Special Agent, District Director Internal Revenue Service, Fresno, stating that "the criminal investigations of JAMES R. COSON, FRESNO BRASS WORKS and CATALINA BRASS COMPANY are still open. Because of this, and due to the fact that summons enforcement proceedings are pending, it is felt that we are in no position to discuss any possible civil settlements at this time." A copy of this letter is attached hereto marked Exhibit "C".

7. With respect to the decision of this Honorable Court in *United States* v. *Cromer*, 483 F.2d 99 (9th Cir. 1973), which is discussed in detail in appellants' accompanying memorandum of points and authorities, affiant avers:

(a) Affiant studied the opening brief to this Honorable Court of appellant George Cromer and found that appellant failed to include therein any reference or citation to the summons enforcement decision in *United States* v. *Kyriaco*, 326 Fed. Supp. 1184 (D.C. Cal. 1971), which was heard by the District Court with the blessing of the Supreme Court of the United States, and is diametrically opposed to *Cromer*.

(b) Affiant also examined the brief of appellees, United States of America, et al., and found that the only

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reference to *Kyriaco* was set forth on p. 16 of the appellees brief and erroneously cited as being in support of the following rule announced in the *Cromer* decision:

> "These cases support our conclusion that the time of issuance is the significant date in terms of the validity of the summons. They recognize that if there is a proper civil purpose at that time, events occurring subsequent thereto do not vitiate that purpose, as the Internal Revenue has a continuing duty to determine and collect the civil liability."

A copy of said p. 16 is attached hereto marked Exhibit "D".

(c) On March 5, 1975, appellants obtained from Thomas A. Baird, Esq., one of the counsel in *Kyriaco,* a copy of the Kyriaco Petition for a Writ of Certiorari to the Supreme Court of the United States for review of the judgment and opinion of the Court of Appeals for the Ninth Circuit, *United States* v. *Ruggeiro,* 425 F.2d 1069 (9th Cir. 1971), which case was re-entitled *Andrew Kyriaco* v. *United States.* Affiant avers that the references in the accompanying memorandum of points and authorities to allegations in the petition for a writ of certiorari are true and correct.

(d) On March 6, 1975, Orin Grossman, Esq., one of the attorneys for George Cromer, advised affiant that he had presented the oral argument of the cause to the United States Court of Appeals for the Ninth Circuit, and that during such argument he had not mentioned the case *United States* v. *Kyriaco,* supra.

/s/ Edgar L. Fraser
Edgar L. Fraser

Subscribed and sworn to before me this 14 day of March, 1975.

/s/ Carol A. Nicholas
Carol A. Nicholas

Notary Public in and for said County and State

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Exhibit "A"

DEPARTMENT OF THE TREASURY
REGIONAL COUNSEL
INTERNAL REVENUE SERVICE
WESTERN REGION

Address any reply to:
447 Sutter St., Room 628,
San Francisco, Calif. 94108

Date: Jan. 2, 1974

In reply refer to:

CC:SF-CT-105-73, 106-73, 107-73
LRO

Certified Mail
Return Receipt Requested

Edgar L. Fraser, Esq.
4050 Wilshire Blvd., Suite 312
Los Angeles, California 90005

In re: James R. Coson, et ux.
Fresno Brass Works
Catalina Brass Co.
Fresno, California

Dear Mr. Fraser:

A report covering an investigation of the joint income tax liabilities of James R. and Angela Coson for the years 1968 through 1971, the corporate income tax liabilities of Fresno Brass Works, Inc., for the fiscal years ending July 31, 1968, through July 31, 1970, and the corporate income tax liabilities of Catalina Brass Co., Inc., for the fiscal years ending June 30, 1969, and June 30, 1970, has been referred to this office with a recommendation that criminal proceedings be instituted against James R. Coson for evading his and his wife's personal income taxes for 1968 and 1969, for evading the corporate income taxes

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of Fresno Brass Works, Inc., for the fiscal years ending July 31, 1968 through July 31, 1970, and for evading the corporate income taxes of Catalina Brass Co., Inc., for the fiscal years ending June 30, 1969, and June 30, 1970. The report also contains a recommendation of prosecution for income tax evasion under *Int. Rev. Code of 1954,* § 7201 against Fresno Brass Works for the fiscal years ended July 31, 1968, through July 31, 1970, and against Catalina Brass Company for the fiscal years ended June 30, 1969, and June 30, 1970.

This will confirm the conference to discuss the cases, set during our telephone conversation on December 28, 1973. The conference has been scheduled with me in Room 803 at the above address for January 4, 1974, at 10:30 a.m. If you wish to contact me by telephone, my number is 415-556-8715.

Pursuant to our agreement, it is my understanding that you will bring Powers of Attorney with a written declaration concerning your qualifications to practice in accordance with 5 U.S.C. § 500, authorizing you to represent James R. and Angela Coson in their individual tax liabilities for the above-designated years, Fresno Brass Works, Inc., in its corporate tax liabilities for the above-designated years, and Catalina Brass Co., Inc., in its corporate tax liabilities for the above-designated years.

Very truly yours,

LAMONT R. OLSON
Lamont R. Olson
Attorney

1cc—William N. Snell, Esq.

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Exhibit "B"

DEPARTMENT OF THE TREASURY
REGIONAL COUNSEL
INTERNAL REVENUE SERVICE
WESTERN REGION

Address any reply to:
447 Sutter St., Room 628,
San Francisco, Calif. 94108

Date: May 17, 1974

In reply refer to:
CC:SF-CT-105-73, 106-73, 107-73
LRO

E. L. Fraser, Esq.
4050 Wilshire Boulevard, Suite 312
Los Angeles, California 90010

In re: James R. Coson, et ux.
Fresno Brass Works
Catalina Brass Co.
Fresno, California

Dear Mr. Fraser:

Reference is made to the conference in the above matter which was held in this office on January 4, 1974, and to your request that you be notified of the action taken by this office.

This is to advise that the case has been forwarded to the Department of Justice, Washington, D. C.

Sincerely yours,

LAMONT R. OLSON
Lamont R. Olson
Attorney

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Exhibit "C"

DEPARTMENT OF THE TREASURY
DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE

Address any reply to:
Intelligence Division
1130 "O" Street, Room 1210
Fresno, California 93721

Date: September 17, 1974

In reply refer to: I-1:PGL:an

Mr. E. L. Fraser, Attorney
4050 Wilshire Boulevard, Suite 312
Los Angeles, California 90010
Dear Mr. Fraser:

In re: James R. Coson et al.

Reference is made to your letter of September 12, 1974 addressed to Marshall P. Jennings, Revenue Agent. You requested therein a meeting with him and me to discuss the audits of James R. Coson and related corporations.

I wish to inform you that as of this date, the criminal investigations of James R. Coson, Fresno Brass Works, and Catalina Brass Company are still open. Because of this and due to the fact that the summons enforcement proceedings are pending, it is felt that we are in no position to discuss any possible civil settlements at this time.

Yours Very Truly,

PHILIP G. LARSON
Philip G. Larson
Special Agent

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STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

Section 7402. Jurisdiction of District Courts.

* * * *

(b) To Enforce Summons.—If any person is summoned under the internal revenue laws to appear, testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Section 7602. Examination of Books and Witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7604. Enforcement of Summons.

(a) JURISDICTION OF DISTRICT COURT.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) ENFORCEMENT.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

BRIEF FO

RESPONDE

OPPOS

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ENTS IN

SITION

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-183

JAMES R. COSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision in this case upholding the enforcement of an internal revenue summons to produce corporate books and records. The district court ordered the summons enforced (Pet. App. 4a-5a), and the court of appeals affirmed (Pet. App. 1a-3a).

After briefs had been filed in the court of appeals and prior to oral argument, the Regional Counsel of the Internal Revenue Service recommended to the De-

partment of Justice that criminal proceedings for violation of the internal revenue laws be instituted against petitioner Coson and two of his corporations. Subsequently, however, the Department of Justice returned the case to the Internal Revenue Service for further investigation.

Petitioners moved in the court of appeals to enlarge the record in order to argue that the Internal Revenue Service's recommendation for criminal prosecution subsequent to the issuance of the summons rendered the summons unenforceable. The court of appeals denied the motion because the matter had not been presented to the district court. The basis upon which petitioners seek certiorari is their assertion that the internal revenue summons is unenforceable because (Pet. 2) its "sole purpose * * * is to aid prosecution of the criminal case * * *."

1. In *Donaldson* v. *United States*, 400 U.S. 517, 536, this Court held that "an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." The summons in this case meets the *Donaldson* test since it was issued prior to the Service's recommendation for prosecution.

Contrary to petitioners' assertion (Pet. 10), there is no "conflict and confusion" with respect to the question whether a summons can be enforced if the Internal Revenue Service recommends prosecution after its issuance but before its enforcement. Six circuits have held that a summons is enforceable under such circumstances. See *In re Magnus, Mabee & Reynard*,

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Inc., 311 F.2d 12, 14-15 (C.A. 2), certiorari denied, 373 U.S. 902; *United States* v. *Weingarden*, 473 F.2d 454, 461 (C.A. 6); *United States* v. *Held*, 435 F.2d 1361, 1364 (C.A. 6), certiorari denied, 401 U.S. 1010; *United States* v. *Moriarty*, 435 F.2d 347, 348 (C.A. 7); *United States* v. *Giordano*, 419 F.2d 564, 568, n. 5 (C.A. 8), certiorari denied, 397 U.S. 1037; *United States* v. *Cromer*, 483 F.2d 99, 101 (C.A. 9); *United States* v. *Hodgson*, 492 F.2d 1175, 1177 (C.A. 10).

While there are dicta in *United States* v. *Billingsley*, 469 F.2d 1208, 1210 (C.A. 10), and in *United States* v. *Monsey*, 429 F.2d 1348, 1351 (C.A. 7), suggesting that the commencement of a criminal proceeding subsequent to the issuance of a summons should be considered in determining its enforceability, both the Tenth and Seventh Circuits subsequently in *United States* v. *Hodgson*, *supra*, 492 F.2d at 1177, and in *United States* v. *Moriarty*, *supra*, 435 F.2d at 349, allowed the enforcement of a summons after criminal tax indictments had been returned. In *Moriarty*, the Seventh Circuit explained that its decision in *Monsey* was not to be read to prohibit enforcement of an internal revenue summons in such circumstances. As that court noted, a recommendation for prosecution after the issuance of a summons does not, by itself, establish that the summons was issued solely in furtherance of the criminal prosecution as long as the civil purpose for investigation continues. See *United States* v. *Moriarty*, *supra*, 435 F.2d at 349.[1]

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[1] Petitioners' reliance (Pet. 8, 9, 12) upon *United States* v. *Zack*, 375 F. Supp. 825 (D. Nev.), and *United States* v.

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Petitioners further argue (Pet. 7-8) that this Court's denial of certiorari in *Kyriaco* v. *United States*, 401 U.S. 922, with leave to raise the claim of the subsequent criminal investigation in the lower courts, establishes that the summons in this case should not be enforced. But the Court's action in *Kyriaco* does not suggest that an intervening recommendation for criminal prosecution renders a summons unenforceable. At most, this Court simply allowed the petitioner in that case an opportunity to present a subsequent factual development to the district court. See *United States* v. *Weingarden*, *supra*, 473 F.2d at 461, n. 12.

Since the lower courts have not yet passed upon petitioners' claim, there is no basis for review by this Court at this juncture. Petitioners are at most en-

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Kyriaco, 326 F. Supp. 1184 (C.D. Cal.), is misplaced. In *Zack*, the district court found that a search of the taxpayer's offices pursuant to a warrant one week before the issuance of the summons demonstrated that the sole object of the investigation was to gather data for a criminal prosecution. However, this decision was recently reversed by the court of appeals (No. 74-2467, July 16, 1975). That court observed that if there was a proper civil investigation, the search warrant would not have been issued to further a solely criminal investigation and that the district court therefore erred in concluding that the issuance of a search warrant was equivalent to an indictment or a recommendation for prosecution. Moreover, although the taxpayer prevailed in *Kyriaco*, he subsequently complied with the summons, thereby rendering the case moot. See *United States* v. *Weingarden*, *supra*, 473 F.2d at 461, n. 12.

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titled to raise the point in the district court as the taxpayer did in *Kyriaco*.[2]

Finally, if, as petitioners urge, an internal revenue summons would be rendered unenforceable by a recommendation for criminal prosecution made subsequent to its issuance, taxpayers would be encouraged to delay compliance as long as possible by resisting enforcement in the courts. Because of the statutes of limitations with respect to criminal tax prosecutions, the Internal Revenue Service would often be compelled to make a recommendation to the Department of Justice for criminal prosecution subsequent to its issuance of a summons but before its enforcement by the courts. Taxpayers should not be enabled thus to defeat the enforcement of the Service's summonses by means of resistance and delay.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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[2] Subsequent to this Court's denial of certiorari in *Kyriaco*, however, the Ninth Circuit in *United States* v. *Cromer*, 483 F.2d 99, rejected the contention advanced by petitioners here.

[3] Moreover, the documents sought by the summons here are corporate books and records which are not eligible for the Fifth Amendment privilege against self-incrimination. Hence, even if petitioner were indicted, such records could be obtained by a grand jury or trial subpoena. See *Bellis* v. *United States*, 417 U.S. 85, 88-90, 100, and cases cited therein.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-183

JAMES R. COSON, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*

REPLY TO MEMORANDUM IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-183

JAMES R. COSON, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*

REPLY TO MEMORANDUM IN OPPOSITION

1. Respondents' assertion that decisions in six circuits have settled the issue raised by the petition in this case is incorrect. In two circuits—the Seventh and Tenth—the law is, at minimum, uncertain. Decisions in those circuits subsequent to *Donaldson* v. *United States,* 400 U.S. 517 (1971) and *Kyriaco* v. *United States,* 400 U.S. 922 (1971) directly conflict with decisions in the Sixth and Ninth Circuits. *Compare United States* v. *Monsey,* 428 F.2d 1348 (7th Cir. 1970) and *United States* v. *Billingsley,* 469 F.2d 1208 (10th Cir. 1972) *with United States* v. *Weingarden,* 473 F.2d 454 (6th Cir. 1973) and *United States* v. *Cromer,* 483 F.2d 99 (9th Cir. 1973).[1] And, contrary to respondents' claim (Opp. 3), subsequent decisions in

[1] Decisions in the Second and Eighth Circuits were prior to *Donaldson* and *Kyriaco* and are thus of questionable vitality. *See In re Magnus, Mabee & Reynard, Inc.,* 311 F.2d 1216 (2d Cir. 1962), *cert. denied,* 373 U.S. 902 (1963); *United States* v. *Giordano,* 419 F.2d 564, 568, n.5 (8th Cir. 1969), *cert. denied,* 397 U.S. 1037 (1970) (dictum).

the Seventh and Tenth Circuits did not overrule *Monsey* and *Billingsley*.[2]

If all the pertinent decisions are considered, it cannot be said that the law is settled among the lower federal courts.[3] This Court should grant certiorari to end the conflict and confusion on the issue.[4]

2. Respondents' description (Opp. 3-4, n. 1) of the proceedings in *Kyriaco* subsequent to this Court's denial of the petition for certiorari is misleading. Counsel for *Kyriaco* in the district court has advised the undersigned that (i) most of the records were obtained by means of a *grand jury subpoena* issued shortly after the district court's refusal to enforce the administrative summons and (ii) the I.R.S. summons was not complied with until *after* the criminal cases had been disposed of.

3. Respondents' concern (Opp. 5) that taxpayer resistance to enforcement of I.R.S. summonses will

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[2] Respondents state incorrectly that there was an indictment prior to enforcement in *United States* v. *Hodgson*, 492 F.2d 1175 (10th Cir. 1974). Opp. 3. In that case, a recommendation for criminal prosecution from the Internal Revenue Service to the Department of Justice had not even occurred. *See also* Pet. 12-13.

[3] Recent decisions in the Ninth and Third Circuits further illustrate the extensive litigation and uncertainty in the federal courts on summons enforcement issues. *See United States* v. *Zack*, No. 74-2467 (9th Cir., July 16, 1975); *United States* v. *Lafko*, No. 74-2083 (3d Cir., July 31, 1975).

[4] As respondents point out, the courts below did not assess the validity of the summons in light of developments since its issuance. Opp. 4-5. If this Court denies certiorari, petitioners will seek a hearing in the district court. The lack of consideration of the issue below does not, however, warrant denial of the petition in these circumstances because the law is uncertain and the federal courts, including the courts below, need the guidance of this Court at this time.

improperly interfere with criminal investigations is misplaced. Respondents have adequate alternatives to insure that law enforcement efforts will not be thwarted. They admit that information could be obtained in this case by other means which are traditionally associated with the criminal process, such as a grand jury or trial subpoena. Opp. 5, n. 3. And, indeed, that course was followed in *Kyriacu*. Petitioners do not suggest that the Government should be barred from obtaining information for criminal prosecution simply because prosecution has been recommended. The point is simply that the Government should be required to follow procedures which have been established for prosecuting a criminal case, and not be permitted to employ civil process to that end.

For the reasons set forth above and in the petition, the Court should issue a writ of certiorari to review the opinion and judgment of the Court of Appeals.

Respectfully submitted.

MORTIMER M. CAPLIN
LEON F. IRISH
JOHN F. DEVELY
CAPLIN & DEVELY
1101 Seventeenth Street, N.W.
Washington, D.C. 20036

EDGAR L. FRASER
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Attorneys for Petitioners

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